STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

ANTONIO TONY GLOSTER

Defendant-Appellant.
_____/

Supreme Court No.

Court of Appeals No. 316553

Lower Court No. 12-10845-03

NOTICE OF HEARING AND NOTICE OF E- FILING

TO: **CLERK'S OFFICE**
Michigan Court of Appeals
Suite 14-300
3020 West Grand Boulevard
Detroit, MI 48202

CLERK'S OFFICE
Wayne County Circuit Court
Criminal Division
Frank Murphy Hall of Justice
1441 St Antoine Detroit, MI 48226

WAYNE COUNTY PROSECUTING ATTORNEY
Criminal Division
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1441 St Antoine
Detroit, MI 48226

PLEASE TAKE NOTICE that on **March 10, 2015,** the undersigned will move this Honorable Court to grant the within **APPLICATION FOR LEAVE TO APPEAL.**

Undersigned hereby certifies that one copy of the application and Notice of Hearing and Notice of E-Filing was e-served on the Wayne County Prosecutor's Office as listed above and one copy of this Notice of Hearing & Notice of Filing was served on each of the court clerk's listed above by regular mail.

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Date: February 13, 2015

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WAYNE COUNTY PROSECUTOR
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APPLICATION FOR LEAVE TO APPEAL
APPENDIX

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes and Rules

STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Wayne County Circuit Court by jury trial and a Judgment of Sentence was entered on April 22, 2013. A Claim of Appeal was filed on June 3, 2013 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated May 24, 2013, as authorized by MCR 6.425(F)(3). The Court of Appeals had jurisdiction in Mr. Gloster's appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A), MCR 7.204(A)(2). This Court now has jurisdiction pursuant to MCR 7.301 (A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. WAS DEFENDANT-APPELLANT ANTONIO GLOSTER DENIED HIS RIGHT TO A FAIR TRIAL BY THE TRIAL JUDGE'S REFUSAL TO REDACT FROM AN INTERROGATION VIDEO AND TRANSCRIPT IRRELEVANT BUT HIGHLY PREJUDICIAL ACCUSATIONS BY THE INTERROGATING OFFICERS THAT MR. GLOSTER HAD PARTICIPATED IN FOUR ROBBERIES IN ADDITION TO THE ONE FOR WHICH HE STOOD TRIAL?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

II. MUST MR. GLOSTER BE RESENTENCED WHEN THE SENTENCING COURT ERRED IN SCORING OFFENSE VARIABLE 10 AND CORRECTION OF THIS ERROR WOULD AFFECT THE GUIDELINE RANGE?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Antonio Gloster appealed as of right to the Court of Appeals challenging the admission of substantially more prejudicial than probative portions of the police interrogation. In the interrogation, the police officers accused Mr. Gloster of being involved with four different robberies, though Mr. Gloster denied involvement in each one. Even though the prosecution did not seek to admit evidence of these robberies under MRE 404(b), the prosecution objected when the defense moved before trial to redact mention of these robberies.

Mr. Gloster also appealed the scoring of Offense Variable (OV) 10. Mr. Gloster's guidelines were raised by scoring OV 10 fifteen points for "predatory conduct" even though there was no predatory conduct above that of a "run of the mill robbery." Mr. Gloster also objected to the scoring of OV 10 on the grounds that he was only the driver of the robbery, and he should not be scored based on the co-defendant's conduct.

The Court of Appeals affirmed Mr. Gloster's convictions and sentence in an unpublished opinion dated December 30, 2014. (Murray, P.J., Saad and Fort Hood, JJ.) (Opinion attached as Appendix A). The Court of Appeals found the trial court properly admitted the video and transcript and that even if the court erred, it was harmless. The Court of Appeals also held that OV 10 was scored correctly.

This Court should peremptorily reverse Mr. Horn's convictions, grant him a resentencing, or grant leave to appeal. The Court of Appeals' opinion is clearly erroneous and will cause material injustice. MCR 7.302(B)(5).

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Defendant-appellant Antonio Gloster stood trial in Wayne County Circuit Court, Judge Lawrence Talon presiding, on a charge of armed robbery[1] and an alternative count of unarmed robbery.[2] After a jury convicted him of armed robbery, Judge Talon sentenced him to serve a prison term of eighty-five months to twenty years.

Overview and Issues on Appeal

Outside the Polish Market in Hamtramck, Michigan, a man tried to snatch a necklace from the neck of a woman. The two struggled, the woman kept her necklace, and the man fled. A companion fled with him. One of the two pulled a gun and shot at a bystander who tried to stop them. The would-be robbers then jumped inside a blue Jeep Liberty and sped away.

Among those arrested in connection with the incident was defendant-appellant Antonio Gloster. Interrogated by the police, Mr. Gloster admitted to driving the blue Jeep Liberty to and from Hamtramck. He'd driven four men there and back: his two brothers, a cousin, and a friend of a brother. He did not know their plans. He only found out when he saw his brother's friend grab a woman's chain. He'd also heard a gunshot, though he hadn't seen the shooter or a gun.

His lawyer would later argue that, though Mr. Gloster may have helped the others escape, he played no part in the attempted chain-snatching or shooting.

The prosecutor would argue that Mr. Gloster must have known about the robbery plan before driving the others to Hamtramck, because he'd admitted (in the same interrogation) to driving three of them to Hamtramck the night before and watching them commit a gunpoint robbery.

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[1] MCL 750.529

[2] MCL 750.530

The police interrogation was video-recorded and transcribed.[3] At trial, the jury watched the recording, and each juror was provided with a copy of the transcript.

During the interrogation police officers asked Antonio Gloster about not just the two Hamtramck incidents at issue, but also about four other robberies. The officers accused Mr. Gloster of involvement in each of the four other robberies. Mr. Gloster denied involvement.

The prosecution did not accuse Mr. Gloster of participating in the four other robberies or seek to admit evidence of these other robberies under MRE 404(b).[4] Even so, when defense counsel moved before trial to redact mention of the four robberies from the recording and transcript, the prosecutor objected, arguing that Mr. Gloster's complete denials of involvement in the other robberies lent credence to his partial admissions of involvement in the Hamtramck incidents. The judge agreed with the prosecutor and denied the defense motion to redact. Instead, the judge instructed the jury not to view the officers' questions and statements as evidence.

In this appeal, Mr. Gloster contends that the judge should have granted his motion to redact. The officers' other-robbery accusations had no bearing on the issues at trial, and even to the extent they did those accusations were substantially more prejudicial than probative. Moreover, the judge's cautionary instruction was inadequate to dispel the prejudice. Mr. Gloster seeks retrial. See Point I of this brief.

[3] The interrogation was recorded on a DVD and transcribed by a member of the prosecution's staff. The transcript and the contents of the statement were the subject of numerous pretrial motions. At trial, an edited redacted version of the transcript was passed out to the jurors to use as an aid while watching the DVD.

[4] MRE 404(b) governs the admissibility of "other crimes, wrongs, or acts."

Mr. Gloster also raises a second issue, related to sentencing. His guidelines range was increased by the judge's decision, over defense objection, to score OV 10 as if he had engaged in "predatory conduct." MCL 777.40(1)(a). In Point II of this brief, he seeks resentencing.

The pertinent trial evidence

—the charged offense at the Polish Market

On October 20, 2012, the complaining witness, Regina Szczepanik, was walking by the Polish Market in Hamtramck when an unknown male grabbed her necklace. (T II, p 69, 9-10) Ms. Szczepanik was not able to see what the person's face looked like and didn't know him. (T II, p 75, 2-3) (T II, p 82, 24-25) He hit her on her head knocking her to the ground. (T II, p 69, 11-12) (T II, p 70, 24-25) She held on to her necklace and the man never got her chain. (T II, p 70, 2-7) (T II, p 73, 22-24)

Kevin Parrish was in his truck at a light on Joseph Campeau when he saw Ms. Szczepanik on the ground with a man standing over her. (T II, p 107, 14-20) (T II, p 108, 15-18) The man, accompanied by a second man, began to run toward Parrish. (T II, p 109, 10) Parrish jumped from his truck and grabbed one of the men. (T II, p 109, 6-8) He let go when the other shot a gun at him and the bullet nicked his elbow. (T II, p 109, 20-21) (T II, p 110, 5-6)

James and Corienna Duff were unloading their car at their home near the Polish Market when they heard a gunshot. (T III, p 33, 4 & 24) (T III, p 34, 1) (T III, p 53, 3-4) Mr. Duff saw two men heading west on Belmont and a third man run north up the alley. (T III, p 36, 4-6 & 8) Mrs. Duff called the police and gave them the license plate number of the vehicle, a blue Jeep Liberty. (T III, p 53, 16-18) (T III, p 54, 14-17) Police arrived on the scene right away. (T II, p 74, 19)

Antonio Gloster's girlfriend, Christina Clements, owned a blue Jeep Liberty. (T III, p 64, 17-18) (T III, p 64, 19-23) She let Antonio drive it sometimes. (T III, p 65, 1-2 & 24-25) He had driven it the night before the robbery for which he stood trial. When he came home, in the early morning of October 20, he was with his brothers Calvin and Paris, and the three of them were talking about "a lady and a purse and about eighty-nine dollars." (T III, p 65, 3-9)

That same day Antonio dropped her off at work and then, around 2:00 p.m., arrived there with Paris and Calvin to pick her up. (T III, p 66, 22-24) She wasn't sure who was driving. (T III, p 83, 11-14)

She never saw Antonio sitting around talking to his brothers about how they were going to rob people. (T III, p 73, 16-19) She never saw a gun passed between the brothers or heard them planning what they would use to complete a robbery. (T III, p 73, 21-25) (T III, p 74, 1-2) She never saw the brothers with unexpected jewelry and Antonio never gave her money. (T III, p 83, 15-16) (T III, p 83, 18-20)

On October, 22, 2012, Detective Robert George and Detective Jacqueline Crachiola interviewed Antonio Gloster. (T III, p 140, 12-14) (T III, p 141, 4-5) Mr. Gloster told them that he, his brothers Calvin and Paris, his cousin Jamarie Muhammed, and his brother's friend Marvin Graham went to Hamtramck "trying to get some money." (Interview, p 5-6)[5] Paris and Jamarie left the car to "go look for some money" to put in the meter. (Interview, p 8) Calvin and Marvin were out of the car and one of them was "tussling" with a girl when another individual came up to help. (Interview, p 6) Mr. Gloster indicated he heard a gunshot but didn't know who had the gun; it was either Calvin or Marvin. (Interview, p 6 & 9) Mr. Gloster explained that if he

[5] An edited and partially redacted version of the prosecution transcript was admitted as Prosecution Exhibit 6. That transcript has gone missing. The original, unedited or redacted version of the transcript that appears in the lower court file was attached as Attachment 1 to the Brief on Appeal in the Court of Appeals.

had known someone had been shot he "wouldn't have even helped them get away." (Interview, p 12)

—404(b) offense

Kristin Wilk was walking home from a bar at around 1:30 am on October 20th when three guys with guns got out of a van and took her purse and necklace. (T III, p 23, 1-4) (T III, p 22, 14-22) Her purse had about 80 dollars in it. (T III, p 30, 5) The car appeared to be a dark colored minivan. (T III, p 25, 2-6)

Antonio Gloster told Detective George that he'd driven Calvin, Marvin, and Jamarie somehere at around 2:30 am on the 20th, and that the three others had robbed "some lady," getting 80 dollars. (Interview, p 10-11)

The prosecution filed a "bad acts" notice under MRE 404(b) to admit evidence of this uncharged robbery to show intent, notice, and lack of mistake. (Motion 3/18/13, p 2-12) The trial judge admitted the evidence over objection. (Motion 3/18/13, p 24, 18-20)

—the interrogation recording and transcript

The police-interrogation recording was hard to understand. The prosecution therefore prepared a transcript to aid the jury. Before trial, the defense moved in limine to exclude the prosecution's transcript on two grounds: (i) that it was inaccurate, and (ii) that it contained both references to otherwise inadmissible other bad acts and expressions of the interrogating officer's opinion about the strength of the evidence.[6] The first complaint was resolved before trial and is not at issue on appeal. The second was not, and is.

The defense pointed to eight places in the recording and transcript in which the interrogating officer either accused Antonio Gloster of having taken part in other robberies or

[6] Though the motion referred to just the transcript, in this second respect it was treated by court and counsel as an objection to both the transcript and the recording itself. (T II, p 4, 3-8)

expressed an opinion about the strength of the evidence in the case at issue. See Motion in Limine[7], ¶¶ 9-16.

The trial prosecutor agreed to redact the portions of the transcript and recording referred to in ¶¶ 13-16. The objections raised in those paragraphs are therefore not at issue in appeal.[8]

At issue on appeal are the other-robberies accusations referred to in ¶¶ 9-12.

On pages 13 and 14 of the interrogation transcript, the detectives questioned Antonio Gloster about four robberies not at issue in this prosecution. The first occurred, said the detectives, after Antonio dropped his girlfriend off on Joseph Campau Street:

> DET CRACHIOLA: Let me refresh your memory on another one. One day when you came to town with Christina, and dropped her off while you went and hit a lick.
> ANTONIO NODS HIS HEAD NO.
> DET CRACHIOLA: Dropped her off on Joseph Campau
> DET GEORGE: Yep.
> DET CRACHIOLA: And you guys went and did something.
> ANTONIO: Dropped her off on Joseph Campau? That don't even sound right. No.
> DET GEORGE: Yep. You had her hang out for a minute while you went and hit a lick real
> quick and then you came back and grabbed her.
> ANTONIO: No.
> DET GEORGE: Yep.
> ANTONIO: That's not true. That one really not true. No. Cause I don't never do no licks on
> my own.
> DET CRACHIOLA: No. You didn't do it by yourself.
> DET GEORGE: You weren't by yourself. You're a good driver.

(Interview, p 13)

They next questioned him about two more robberies—one at Wayne State University, and one involving a stranded motorist:

[7] The motion in limine was filed as Attachment 2 to the Brief on Appeal in the Court of Appeals.
[8] The prosecution also agreed to redact most of transcript pages 20-23. The material contained on those pages is therefore also not at issue on appeal.

> DET GEORGE: . . . [W]e can go back further. We can go back to a case with Wayne State University that contacted me where her car was used and guys were pulling up, pulling guns on students. Then we can go back to a stranded motorist on the freeway who ending having that same Liberty pull up and the guys robbing them.
> ANTONIO: No I helped that guy.
> DET GEORGE: NO NO NO
> ANTONIO: His name was ahhhh Bill. He was a Nigerian dude. This guy stole his phone, I didn't rob him. I pushed him all the way home in her car.

(Interview, p 14)

They then asked him about the robbery of a woman at an ATM machine:

> DET CRACHIOLA: Okay, let's look at another one what about the one on Joseph Campau where the lady left the ATM Machine.
> ANTONIO: Not ringing a bell.
> DET CRACHIOLA: Not ringing a bell? She got into her Durango and you guys tried to snatch her money from her, but she slammed one of the arms, one of your arms in the door.
> ANTONIO: Not ringing a bell.
> DET CRACHIOLA: Anybody come up with a sore arm?
> ANTONIO SHAKES HIS HEAD NO
> DET CRACHIOLA: Calvin, Marvin?
> ANTONIO SHAKES HIS HEAD NO
> DET GEORGE: How bout this ..... so maybe ..... .
> ANTONIO: Neither one of them.
> DET GEORGE: So how about maybe you weren't there for some of this stuff. What did they say because these are your family. You guys are all sitting around, you all bullshit and you always seem to be the driver when this shit happens. This Liberty is always involved in shit. So you know what? What do you know?
> ANTONIO: I don't know nothing about that one. I'm serious.

Id.

The trial prosecutor asked the judge not to redact these references. Though he agreed with the judge that the detectives' accusations were not other-acts evidence, because Mr. Gloster denied them, he argued that they served another, relevant purpose: to "bolster[] the fact that he admits the two in question here and he's not admitting to everything the police say, just the two that were talking about." (T III, p 94-95)

The judge decided not to make the redactions, but instead (if defense counsel agreed) to give an instruction cautioning the jury not to view the detectives' questions and comments as evidence. (T III, 92-94)

Defense counsel thought the jury would be unable to follow the instruction—that they would be unable to avoid thinking that "where there's smoke there's fire"—but in light of the ruling, asked the judge to give it. (T III, p 95-96)

The prosecution played the DVD of Mr. Gloster's interview for the jury and gave them the redacted transcript to follow along. (T III, p 146-149) Before the video was played, the judge gave the proposed limiting instruction. (T III, p 146-147)

Sentencing

The parties disagreed on several guidelines-scoring decisions, including the one for OV 10. The prosecution argued that the 15-point score for "predatory conduct" was appropriate because "[i]t was clear in the video that several victims went by and they [the co-defendants] waited until Miss Szczepanik, a non-English speaking woman walking alone, before they picked her out." (S 4/19/13, p 16, 13-16) Mr. Gloster objected, arguing that there was no way to know that the victim-to-be was not an English speaker and that "one other person walked by, a male, and he probably wasn't wearing a chain or at least it wasn't visible so they grabbed somebody that looked like they had a chain. It was simply random." (S 4/19/13, p 17, 9-12) Judge Talon agreed with the prosecutor and ruled that "evidence from the trial supports the scoring of fifteen points for offense variable ten for predatory conduct…that the Defendant drove 'em to Hamtramck to this specific location for the purpose of committing larcenies." (S 4/19/13, pp 21, 21-25) When defense counsel later argued that a recent Supreme Court decision required

evidence of "lying in wait" or its equivalent, the judge found that the defendants had, in effect, lain in wait. (S 4/22/13, pp 20, 22-23)

With Judge Talon's rulings, the guideline range became 51 to 85 months. Judge Talon sentenced Mr. Gloster to a prison term of 85-months-to-20-years with credit for 182 days. (Judgment of Sentence)

I. DEFENDANT-APPELLANT ANTONIO GLOSTER WAS DENIED HIS RIGHT TO A FAIR TRIAL BY THE TRIAL JUDGE'S REFUSAL TO REDACT FROM AN INTERROGATION VIDEO AND TRANSCRIPT IRRELEVANT BUT HIGHLY PREJUDICIAL ACCUSATIONS BY THE INTERROGATING OFFICERS THAT MR. GLOSTER HAD PARTICIPATED IN FOUR ROBBERIES IN ADDITION TO THE ONE FOR WHICH HE STOOD TRIAL.

Issue Preservation

The issue was fully preserved by trial counsel's motion in limine and the arguments he made when the issue arose at trial.

Standard of Review

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). The trial court abuses its discretion by choosing an outcome outside range of principled outcomes. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). Questions of law, such as the applicability of a particular rule of evidence, are subject to *de novo* review. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Argument

Mr. Gloster was denied his right to a fair trial when, over his objection, his jury was exposed to the accusations of police detectives that he had committed four robberies other than the one for which he stood trial. All defendants enjoy a due process right to a fair trial undeterred by inadmissible and unfairly prejudicial evidence. US Const amends VI; XIV; Const 1963, art 1, § 20. An important element of a fair trial is that only relevant and competent evidence is introduced against the accused. *Bruton v United States*, 391 US 123, 131; 88 S Ct 1620; 20 L Ed 2d 476 (1968). This right requires a fair trial of the issues involved in the particular case and a

determination of disputed questions of fact on the basis of only properly admitted evidence. *Napuche v Liquor Control Comm,* 336 Mich 398, 403; 58 NW2d 118 (1953).

The accusations at issue, which were contained in an interrogation video and transcript were either entirely irrelevant or substantially more prejudicial than probative. Evidence that is not relevant is inadmissible. MRE 402. Relevant evidence means evidence having a tendency to make any fact of consequence to the action more or less probable than without the evidence. MRE 401. Evidence that is otherwise admissible may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

The trial court abused its discretion by allowing the jury to hear the interrogating officers' accusations of other uncharged bad acts. During the interrogation video viewed by the jury, police detectives not only accused Mr. Gloster of taking part in four other robberies, but described three of them in detail. Though the jury heard Mr. Gloster deny any role in these offenses, it also heard the accusations.

These accusations and denials did nothing to make a material fact at trial any more or less likely. Though the prosecutor contended that Mr. Gloster's denials of the other robberies made his partial admissions to the robbery for which he stood trial more plausible—that they demonstrated that Mr. Gloster was "not admitting to everything the police say, just the two that were talking about" (T III, p 94-95)—the accuracy of Mr. Gloster's words to the police were simply not at issue. Mr. Gloster never disputed that he drove his brothers, his cousin, and their friend to Hamtramck on the October 20th, or that he'd made a similar trip the night before. His defense, in its entirety, was he did not know what his companions were up to and therefore could

not be held responsible for their criminal acts. He freely admitted being their driver. That admission needed no "bolstering."

Even if the other-robbery accusations were in some way relevant, they were quietly clearly substantially more prejudicial than probative. Accusations of other similar crimes is enormously prejudicial. As Professor Imwinkelreid explains:

> "Experienced trial attorneys know that the judge's ruling on the admission of uncharged misconduct can be the turning point in a trial. **Uncharged misconduct evidence 'will usually sink the defense without [a] trace.'** Some veteran defense attorneys shape their entire trial strategy to avoid the admission of uncharged misconduct evidence.
>
> The available research data confirms this belief. . . . [T]he admission of a defendant's uncharged misconduct significantly increases the likelihood of a jury finding of liability or guilt. . . . **[A]s a practical matter, the presumption of innocence operates only for defendants without prior criminal records. Evidence of uncharged misconduct strips the defendant of the presumption of innocence."** Uncharged Misconduct Evidence (3/99 rev), at § 1:02, p 6 (citations omitted) (emphasis added).

Other-crimes evidence is likely to be misused by the jury in at least three different ways, as this Court recognized in *People v Allen*, 429 Mich 558, 569 (1988):

> "First, that jurors may determine that although defendant's guilt in the case before them is in doubt, he is a bad man and should therefore be punished. Second, the character evidence may lead the jury to lower the burden of proof against the defendant, since, even if the guilty verdict is incorrect, no 'innocent' man will be forced to endure punishment. Third, the jury may determine that on the basis of his prior actions, the defendant has a propensity to commit crimes, and therefore he probably is guilty of the crime with which he is charged."

That the accusations came from police officers made matters worse. Jurors often give special credence to statements of the police. *See People v Musser*, 494 Mich 337, 363; 835 NW2d 319 (2013). Especially given the number of accusations and the detail in which they were described, at least some of the jurors must have concluded, as defense counsel feared, "that where there's

smoke there's fire." The detectives' unproved allegations offered those jurors "the much sought-after hook on which to hang its hat." *Musser*, 494 Mich at 363 (citing *People v Peterson*, 450 Mich 349, 374; 537 NW2d 857 (1995)).

Judge Talon's cautionary instruction did not sufficiently remove the taint of the detectives' accusations. Even when a jury is instructed to consider evidence for some legitimate purpose, there is a serious danger that they will treat it as propensity evidence instead. *See Jenkins v United States*, 593 F 3d 480 (2010). Courts have often found that it is difficult to cure the prejudice from admitting such evidence by a limiting instruction. As this Court noted in *People v Crawford*, 458 Mich 376, 398-99; 582 NW2d 785 (1998):

> To use Justice Cardozo's expression, we believe the "reverberating clang" of the evidence that the defendant sold drugs in 1988 drowned the "weaker sound" of the other evidence properly before the jury, leaving the jury to hear only the inference that if the defendant did it before, he probably did it again.[9]

Judge Talon's limiting instruction did not sufficiently cure the prejudice from the admission of all the other accusations of robberies and gun crimes.

Finally, the error was not harmless. Allowing the jury to hear the accusations and comments undermined the reliability of the verdict and was outcome determinative. *See People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). Recently this Court in *Musser* granted a defendant a new trial based on the admission of an officer's prejudicial statements within an interview. When determining that the defendant in *Musser* was entitled to new trial, the Court looked at the amount of evidence against him and found it was not overwhelming. *Musser*, 494 Mich at 363. The evidence against Mr. Gloster was also not overwhelming. None of the witnesses identified Mr. Gloster and there was no physical evidence tying him to the scene.

[9] *Id.* (citing *Shepard v United States*, 290 US 96, 104; 54 S Ct 22; 78 L Ed 196 (1933) and *United States v Merriweather*, 78 F 3d 1070, 1077 (CA 6, 1996)).

Additionally, the statement was the only piece of evidence used to show Mr. Gloster had knowledge of the robbery or the use of weapons.

Our Court of Appeals has often found admission of such bad acts was not harmless error. *See Crawford*, at 400; *People v Major*, 407 Mich 394, 401; 285 NW2d 660 (1979); *People v Drake*, 142 Mich App 357, 360; 370 NW2d 355 (1985) (not harmless to admit bad acts evidence when it had nothing to do with the case against the defendant except to suggest he was a "bad man") This Court must reverse Mr. Gloster's conviction and grant him a new trial.

II. THE SENTENCING COURT ERRED IN SCORING OFFENSE VARIABLE 10. CORRECTION OF THIS ERROR WOULD AFFECT THE GUIDELINE RANGE AND SO MR. GLOSTER MUST BE RESENTENCED.

Introduction and Issue Preservation

The prosecutor requested 15-points for Offense Variable (OV) 10. (S 4/19/13, p 15-17) The prosecution argued that OV 10 should be scored at 15-points for predatory conduct because more than one person walked by before Mr. Gloster's co-defendants tried to grab a necklace off the Polish speaking victim. (S 4/19/13, p 15-17)

Trial counsel argued at sentencing that the behavior at issue did not qualify as predatory as argued in Argument Section A below. Mr. Gloster also filed a proper motin to remand in the Court of Appeals arguing that he should not be scored for his co-defendant's conduct, as more argued in Argument Section B below. Both arguments are therefore fully preserved for review.

Standard of review

The proper interpretation and application of the legislative sentencing guidelines are questions of law, to be reviewed de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). Scoring decisions, which must be supported by a preponderance of evidence, are otherwise reviewed for clear error. *People v Nelson*, 491 Mich 869; 809 NW2d 564 (2012).

Argument

A. OV 10 SHOULD HAVE BEEN SCORED 0 POINTS BECAUSE THERE WAS NO EVIDENCE OF PREDATORY CONDUCT.

There was no evidence of predatory conduct here. For a 15-point score, OV 10 requires proof of predatory conduct. "Predatory conduct means pre-offense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a) While pre-offense conduct need not be directed at a particular person to be considered predatory, there must be something beyond "purely opportunistic" behavior or "routine planning." *People v Huston*, 489 Mich 451, 466; 802 NW2d 261 (2011). Points should not be assessed when the pre-offense conduct is nothing more than "run-of-the-mill planning to effect a crime or subsequent escape without detection." *Cannon*, 481 Mich at 162.

Huston provides an example of predatory behavior. In *Huston*, the victim was alone in a dark lot when she was outnumbered by the defendant and his cohort who had been lying in wait, hidden from her view. *Huston*, 489 Mich at 466-467. Here, by contrast, there was no evidence that Mr. Gloster or anyone else lay in wait, hid from view, or otherwise wait until the victim was alone or otherwise more vulnerable. She was attacked in broad daylight in a public place with many people around. (T II, p 41 & 69) Because there was no evidence of "predatory conduct" as that term was explicated by *Huston*, there was no basis for a 15-point score for OV 10.[10]

[10] It should also be noted that Ms. Szczepanik had no observable vulnerabilities and there was no evidence that Mr. Gloster or any of the co-defendants had any special knowledge of any vulnerabilities. Vulnerability is the "readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." *Huston*, at 466 (2011); MCL 777.40(3)(c). While Ms. Szczepanik did not speak English, there was nothing on the record to indicate that Mr. Gloster or any of the co-defendants knew this fact. (T II, p 63, 66, & 102) There was no evidence that Mr. Gloster had a conversation with Ms. Szczepanik before the robbery took place or that Mr. Gloster had any special knowledge about Ms. Szczepanik or her ability to speak English.

B. IT WAS ERROR TO SCORE OV 10 BASED ON THE CO-DEFENDANTS' CONDUCT WHEN OV 10 SHOULD BE SCORED ONLY FOR THE INDIVIDUAL OFFENDER'S CONDUCT.

The court also erred in assessing OV-10 points based on his co-defendants' conduct. The prosecution's theory of the case was that Mr. Gloster was the driver for the robbery. They presented no evidence that Mr. Gloster took any part in the planning or selection of whom to rob. Judge Talon recognized as much by noting that "while Mr. Antonio Gloster remained in the car two of the other people that he took there went out to the corner to watch for an appropriate victim and then when the complainant came out that's when one of the Defendants… snatched the chain from the complaining witness." (S 4/19/13, p 22, 1-9) Judge Talon based his scoring on the co-defendants' conduct rather than that of Mr. Gloster.

It was error to score points under OV 10 based on the conduct of others. Offense variable 10 should only be scored for the individual offender's conduct. Offense variables 1, 2, and 3 provide specific language requiring the court to assess the same amount of points for all offenders in multiple offender situations. MCL 777.31 (2)(b); MCL 777.32(2); MCL 777.33(2)(a). Offense variable 10 lacks such an instruction.

Additionally, this Court in *Cannon* set out a list of questions to determine when points for predatory conduct are appropriate. The court set forth the following questions:

> (1) Did the offender engage in conduct before the commission of the offense? (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation? (3) Was victimization the offender's primary purpose for engaging in the preoffense conduct? If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct under MCL 777.40. *Cannon,* at 161-162.

It is worth note that every reference to offender is singular and says nothing about multiple offenders or co-defendants' conduct.

The Court of Appeals in *People v Hunt*, 290 Mich App 317, 325-326; 810 NW2d 588 (2010), acknowledged the validity of the same argument applied in the context of OV 7. In *Hunt*, the Court held that only the defendant's actual participation could be scored because OV 7 lacks the language contained within OVs 1, 2, and 3 that directs courts to assess the same number of points to each offender in multiple-offender cases. *Id.* at 325-326. The Court of Appeals distinguished cases where scoring of OV 7 was upheld, pointing out that in those cases the courts had scored acts "*by the defendant." Id.* at 325 (emphasis in original). OV 10, like OV7, lacks a multiple-offender instruction. It must, like OV 10, be scored only for acts by the defendant.

C. MR. GLOSTER IS ENTITLED TO RESENTENCING BECAUSE HIS SENTENCE FALLS OUTSIDE OF THE CORRECTED GUIDELINE RANGE.

As set forth above, Mr. Gloster's sentence is not within the range provided for by the statutory sentencing guidelines. With the correct guidelines, the proper guideline range is lowered to 42 to 70 months under the Sentencing Grid for Class A Offenses.[11] MCL 777.62. Where a defendant's sentence is based upon inaccurate guideline range calculations, the defendant is entitled to be resentenced. *People v Francisco*, 474 Mich 82, 92; 711 NW2d 44 (2006); *People v Kimble*, 470 Mich 305, 684 NW2d 669 (2004). Mr. Gloster's sentence of 85 months to 20 years is outside of the proper guideline range, and so he is entitled to resentencing. This Court must remand for resentencing.

[11] Mr. Gloster had no prior record so the prior record variables should be set at zero as agreed upon by the parties at sentencing. (S 4/19/13, p 7, 9-10) With the correct scoring of OV 10 at zero, Mr. Gloster would have a total of 55 offense-variable points, placing him in grid A-III instead of A-IV. *See* MCL 777.62.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court peremptorily reverse Mr. Gloster's convictions, order resentencing, or grant leave to appeal.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Kristin E. LaVoy

BY:_____

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